

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARK A. POWELL

Claimant

VS.

SEDGWICK COUNTY

Self-Insured Respondent

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Docket No. 1,020,194

ORDER

Claimant appeals the October 22, 2009, preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes (ALJ). Claimant was denied medical treatment for his neck after the ALJ determined that claimant's neck pain was not causally related to his work injury of September 22, 2004.

Claimant appeared by his attorney, Roger A. Riedmiller of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Robert G. Martin of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held October 22, 2009, with attachments; and the documents filed of record in this matter.

ISSUE

Did the ALJ exceed her jurisdiction by denying claimant medical treatment to his neck? Claimant alleges that his current need for medical treatment for his cervical spine originated from the injury on September 22, 2004, when he fell off a crane, suffering multiple injuries. Respondent contends that claimant's cervical spine complaints did not originate until he was examined by his family doctor, Stephen J. Grindel., D.O., in 2009.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant suffered serious injuries on September 22, 2004, when he fell off a crane, landing about 40 feet below, suffering injuries to his right leg, both arms and shoulders, his right ankle, his low back and his mouth. Claimant underwent surgery on his leg, ankle, left shoulder and right shoulder, and had a crown placed on a tooth in his mouth. He also underwent injections in his low back and was treated conservatively to several parts of his body, in addition to the surgeries. Claimant utilized a walker or crutches for about three years after the accident and was still receiving workers compensation benefits at the time of the preliminary hearing in October of 2009.

The dispute here centers around claimant's need for medical treatment for his cervical spine and the connection between that need for treatment and the accident in 2004. Claimant either testified at hearing about or provided a history of injury to a multitude of health care providers in this matter. Claimant was treated for the various medical injuries to the above listed body parts, but with no treatment for any cervical spine injury. There is no indication of cervical problems in this record until claimant was examined by Dr. Grindel, his family doctor, on March 27, 2009. Even though claimant testified that he advised several of his original treating physicians of the cervical complaints, the medical records fail to indicate any complaints or treatment for the cervical spine during claimant's lengthy recovery period. Additionally, claimant testified that his cervical spine pain began immediately after the fall, but he also told Dr. Stein that it may have started a year after the second shoulder surgery and that he had not suffered significant neck pain, but filed a claim after Dr. Grindel advised that the shoulder pain may be caused by claimant's neck.

When claimant was examined by Dr. Stanley Jones in 2005, claimant's cervical range of motion was within functional limits. When claimant was examined by Chris Fevurly M.D., in 2007, claimant's cervical range of motion was full with no apparent tenderness or pain. Neither orthopedic surgeon Robert P. Cusick, M.D., nor orthopedic surgeon Pat D. Do, M.D., listed neck complaints while treating claimant between August 2007 and April 2009.

Paul S. Stein, M.D., examined claimant at respondent's request and was unable to state within medical certainty that claimant's cervical pain was connected with the 2004 accident.

Claimant argues that the opinion of Dr. Grindel should control. However, while Dr. Grindel answered yes to claimant's attorney's question of whether within a reasonable degree of medical certainty, claimant's current neck and shoulder complaints were, more probably than not, a direct result of the September 2004 accident, Dr. Grindel's letter of July 9, 2009, states that the neck injury "may have occurred on the 22nd of September

2004 and never been noted during previous evaluations and surgical treatment of the shoulder”.¹ This equivocation of his causation opinion is not explained.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant’s burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.²

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.³

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁴

The two phrases “arising out of” and “in the course of,” as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase “in the course of” employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer’s service. The phrase “out of” the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”⁵

It is claimant’s burden to prove the elements necessary to obtain workers compensation benefits in Kansas. Here, the medical evidence fails to display any neck complaints remotely contemporaneous with the original injury. Claimant provides conflicting histories of how and when the neck complaints began. The causation opinion of Dr. Stein directly contradicts claimant’s assertions on causation. And even Dr. Grindel,

¹ P.H. Trans., Cl. Ex. 1.

² K.S.A. 44-501 and K.S.A. 2008 Supp. 44-508(g).

³ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁴ K.S.A. 44-501(a).

⁵ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

claimant's expert, equivocates in his causation opinion. This Board Member finds that claimant has failed to satisfy his burden of proving that his current need for medical treatment for his cervical spine is related to the accident on September 22, 2004.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

The Order of the ALJ is affirmed. Claimant has failed in his burden of proving a causal connection between his current need for medical treatment for his cervical spine and the accident on September 22, 2004.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated October 22, 2009, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January, 2010.

HONORABLE GARY M. KORTE

c: Roger A. Riedmiller, Attorney for Claimant
Robert G. Martin, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

⁶ K.S.A. 44-534a.